Supreme Court, U.S.
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No. 95-1168

In The

# Supreme Court of the United States

October Term, 1995

ROBERT MARK ROSEN, D.O.,

*Petitioner,*

v.

IOWA BOARD OF MEDICAL EXAMINERS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Iowa**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

**1. The Court has jurisdiction to consider Rosen's claim.** The Board argues (pp. 5-6) that Rosen did not on due process grounds challenge, and hence that the Court lacks jurisdiction to consider whether Rosen's due process rights were violated by, *the Board's denial of Rosen's request for rehearing*. The argument forsakes the forest for a tree. The Board does not question the Court's jurisdiction to consider whether Rosen's due process rights were violated by the state's failure to give Rosen timely notice of the real charge against him or by the Board's allowance of the state's amendment. Nor could such a question legitimately be raised. Rosen's due process claim forever was[1] and is[2] that the state gave him no notice of the real charge against him prior to trial and instead, by its inexcusably late amendment, changed – or, as the state supreme court phrased it, "enlarged" – the issue after the trial was over, thereby denying him an opportunity to prepare and present a responsive defense to the real charge against him at trial, in violation of his rights to procedural due process as secured by the Fourteenth Amendment. As the state supreme court recognized by considering the issue (App. 5-6), Rosen's due process

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[1] See pp. 4-5, 5 n.1, 6-7 and App. 42-56 of the petition for writ of certiorari.

[2] See summary of argument at 14-15 and parts C, A and B of petition for writ of certiorari, including captions to parts C, A and B.

claim was well preserved. It is therefore within the Court's jurisdiction.[3]

**2. The fact that Rosen did not request a continuance (after the close of the evidence) does not defeat his claim.** Citing 3 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 15.02[1] (2d ed. 1990), the Board for the first time argues (p. 4) that Rosen forfeits relief because he did not request a continuance. The argument lacks merit. At the time the state offered its amendment, the evidence had already closed. There was nothing left to continue. The cited section from MOORE makes it clear, moreover, that disposition does not turn on the isolated fact that a party did or did not request a continuance. The cited section rather stresses the inter-relationship of the concepts addressed in federal rules of civil procedure 15 and 16, governing amendment and pre-trial conference, respectively, which enable an adjudicatory body "to have the pleadings amended so that the real, disputed issues are

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[3] The portion of Rosen's argument addressing the request for and denial of rehearing is included in the petition for writ of certiorari (pp. 20-21) for two reasons. First, pertinent to the constitutional merits, it illustrates that Rosen had a responsive defense to the real charge against him that he could have prepared and presented at trial if the state had given him notice of the real charge against him prior to trial – and hence shows that Rosen was prejudiced by the absence of notice. Second, pertinent to the Court's decision whether to grant the petition, it illustrates how differently the lower tribunals treated the state (amendment granted) and Rosen (rehearing denied) – and hence, in combination with other factors, helps supply the compelling reasons that must be supplied in order for the petition to be granted. See rule 10 ("[a] petition for certiorari writ will be granted only for compelling reasons").

clearly formulated". In Rosen's case, it was Rosen who sought to effectuate that end by requesting an informal conference and therein disclosing the relevant circumstances. It was the state that subverted that end by withholding amendment until after the close of the evidence. Even more fundamentally, the cited section from MOORE stresses the need to consider the concepts of federal rule of civil procedure 1, among them the concept that procedural issues should be resolved in ways that secure just determinations. The Board says little or nothing about justice.

**3. Rosen did not receive "inferential" notice of the real charge against him.** The Board (p. 4) for the first time cites *Cole v. Layrite Products Co.*, 439 F.2d 958, 961 (9th Cir. 1971). *Cole* affirmed the refusal of an amendment to include an issue first mentioned during argument to the jury. The court said: "rule [15(b)] does not permit amendments to include issues which may be inferentially suggested by incidental evidence in the record". As nearly as Rosen can determine from the brief in opposition, the Board is arguing (1) that rule 15(b) as interpreted by *Cole* does permit amendments to include issues which may be inferentially suggested by *non-incidental* evidence in the record and (2) that the evidence that Rosen signed the application in blank was offered by Rosen himself and was therefore *non-incidental*. Such an argument reads more into *Cole* than is there. *Cole* simply held that amendment was properly refused. It supports Rosen. The concept of "notice by inference" is fraught with difficulty. In this case, there was nothing that would reasonably have led Rosen to infer that the state would allege that the naked signing of a document in blank is without more

fraudulent. That allegation is without precedent in Iowa and is contrary to decisional law elsewhere.[4] Particularly when the state seeks to level so novel an allegation, due process requires that notice be given.

Respectfully submitted,

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[4] See, *e.g.*, *Mannan v. District of Columbia Board of Medicine*, 558 A.2d 329, 340 (D.C. 1989) (although physician showed poor judgment when he signed 1,400 Medicaid billing forms and left completion of details to others, there was no substantial evidence of willful overbilling).